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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN THOMAS ROGAN, Defendant and Appellant.	H045864 (Santa Clara County Super. Ct. No. C1628667)

Defendant John Thomas Rogan appeals from the trial court's decision revoking mandatory supervision and committing him to county jail to serve the remaining term of a six-year split sentence. The sentence was imposed as part of a negotiated disposition after defendant pleaded no contest to, among other things, possessing heroin and methamphetamine for sale. Appellate counsel initially filed a brief stating the case and facts but raising no arguable issues. We sought supplemental briefing regarding the trial court's jurisdiction to enter an order purporting to resentence defendant while this appeal was pending. For the reasons stated here, we will modify the order committing defendant to jail to strike two counts that were to have been dismissed at sentencing, and affirm the order as modified.

I. TRIAL COURT PROCEEDINGS

According to testimony at defendant's preliminary hearing, a San Jose Police officer was on patrol one evening when he noticed a rental van driving in front of him

with Arizona license plates. The officer looked up the license plate number and discovered the van had been reported stolen. The officer followed the van as it pulled into a gas station. When a man (identified at the hearing as defendant) stepped out of the driver's seat, the officer asked him to sit back down. As backup officers arrived, defendant fled the scene on foot. He was eventually subdued with a Taser and arrested. The officer who initially detained defendant searched the van and found a black bag between the driver's and front passenger's seats. The bag contained plastic bags and baggies, a scale, over $100 in cash, a switchblade, a hypodermic needle, and a pipe of the type commonly used to smoke methamphetamine. The officer found 130.4 grams of a white crystalline substance that tested presumptively positive for methamphetamine and 23.8 grams of a black tar-like substance that tested presumptively positive for heroin. A phone found in defendant's pocket contained text messages consistent with drug sales.

Defendant was held to answer and charged by information with possessing methamphetamine for sale (Health & Saf. Code, § 11378) with prior convictions (Pen. Code, § 1203.07, subd. (a)(11)); possessing heroin for sale (Health & Saf. Code, § 11351) with prior convictions (Pen. Code, § 1203.07, subd. (a)(3)); resisting arrest (Pen. Code § 148, subd. (a)(1)); possessing a switchblade (Pen. Code, § 21510); and possessing drug paraphernalia (Health & Saf. Code, § 11364). The information alleged defendant had served two prior prison terms (Pen. Code, § 667.5, subd. (b)), and had six prior possession for sale convictions (Health & Saf. Code, § 11370.2).

As part of a negotiated disposition, defendant pleaded no contest to the two possession for sale counts and to resisting arrest. He also admitted the prior drug convictions and both prior prison terms. The switchblade and drug paraphernalia counts were to be dismissed at sentencing.

The trial court imposed a six-year split sentence (Pen. Code, § 1170, subd. (h)(5)(A)) in September 2016, under which defendant would serve three years in county jail followed by three years released on mandatory supervision. The sentence was

calculated as follows: a three-year middle term for possessing heroin for sale (Health & Saf. Code, § 11351), with a consecutive three-year enhancement for one prior possession for sale conviction (Health & Saf. Code, § 11370.2, subd. (c)). Punishment for the other sentencing enhancements was stricken (Pen. Code, § 1385), and concurrent sentences were imposed for the other counts. (The court imposed concurrent sentences instead of dismissing the misdemeanor switchblade and drug paraphernalia counts, and neither party objected.)

After serving his county jail sentence, defendant was released on mandatory supervision and ordered to report to the probation department. A petition for revocation of mandatory supervision was filed after defendant failed to report to probation. A bench warrant was issued, defendant was arrested, and several months later defendant admitted the violation. The trial court committed defendant to county jail to serve the remainder of his split sentence. Defendant timely appealed from that order.

While this appeal was pending, defendant apparently sought resentencing in the trial court. We previously granted a motion to augment the record to include a minute order that purports to vacate defendant's sentence and resentence him. The minute order states the trial court's intention to dismiss the switchblade and drug paraphernalia counts (per the parties' original plea agreement) and also to dismiss the three-year Health and Safety Code section 11370.2, subdivision (c) enhancement (presumably due to a change in the law we will discuss below). Defendant did not include an amended abstract of judgment in the motion to augment the record. Per the minute order, defendant's sentence would be reduced to three years instead of six.

II. DISCUSSION

After defendant filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 raising no issues, we requested supplemental briefing on three questions: (1) whether the pending appeal deprived the trial court of jurisdiction to enter the purported resentencing order; (2) whether the original sentencing court erred by imposing concurrent sentences

for the switchblade and drug paraphernalia counts instead of dismissing them as the parties had agreed; and (3) whether the three-year Health and Safety Code section 11370.2, subdivision (c) enhancement must be stricken because the conduct to which defendant admitted is no longer punishable as an enhancement.

A. TRIAL COURT JURISDICTION WHILE A CASE IS PENDING ON APPEAL

An appeal from an order in a criminal case " 'removes the subject matter of that order from the jurisdiction of the trial court.' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044.) An appeal generally divests the trial court of authority to make any order affecting the subject matter of the appeal. (*People v. Flores* (2003) 30 Cal.4th 1059, 1064.) " 'The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided.' " (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1089.) There are exceptions to the general rule. Even during a pending appeal, a trial court may correct clerical errors as part of its inherent authority (*In re Candelario* (1970) 3 Cal.3d 702, 705) and correct unauthorized sentences (*Cunningham*, at p. 1044).

1. Jurisdiction to Dismiss the Switchblade and Drug Paraphernalia Counts

Defendant contends the trial court retained jurisdiction to dismiss the switchblade and drug paraphernalia counts because the parties had agreed that those counts would be dismissed as part of the negotiated disposition, such that the original sentence was unauthorized. The Attorney General concedes the trial court's jurisdiction, but on the basis of correcting clerical error. We accept the Attorney General's concession and reasoning. The issue is not whether the sentence for the misdemeanor counts was unauthorized for those offenses. Instead, the issue is that the trial court imposed sentences for counts that never resulted in convictions at all. By later dismissing the counts and deleting reference to them, the trial court addressed what was effectively a

clerical error committed by the original sentencing court. We will direct the superior court to prepare a new abstract of judgment reflecting dismissal of those two counts.

2. Jurisdiction to Strike the Enhancements

Defendant argues that if the original sentence was unauthorized because of the concurrent sentences on the switchblade and drug paraphernalia counts, the trial court was allowed to vacate the entire judgment, restoring him to "the same position as if he had never been sentence[d] at all." He could then take advantage of the amendment to Health and Safety Code section 11370.2, subdivision (c) which came into effect after the original judgment was final. But as we have already explained, the issue here is properly viewed as correcting a clerical error rather than an unauthorized sentence. If the original sentence was not unauthorized, the trial court had no jurisdiction to make the discretionary choice to strike the Health and Safety Code section 11370.2, subdivision (c) enhancement while the case was pending on appeal. Even if we were to consider the original sentence unauthorized as to the switchblade and drug paraphernalia counts, the sentence would be void only as to those two counts and the trial court's jurisdiction would be limited to addressing those counts. (See *In re Sandel* (1966) 64 Cal.2d 412, 418–419 [an unauthorized sentence may be corrected "by appropriate motion to vacate the void portion of the judgment and impose a sentence authorized by law"].)

B. THE ENHANCEMENT FOR PRIOR DRUG CONVICTIONS

Defendant contends the trial court correctly struck the Health and Safety Code section 11370.2, subdivision (c) enhancement when it purported to resentence him because he was entitled to the benefit of an ameliorative change in the law. A functionally identical argument was rejected in *People v. Grzymski* (2018) 28 Cal.App.5th 799, review granted February 13, 2019, S252911 (*Grzymski*). We will explain why we agree with the *Grzymski* court's reasoning to conclude that defendant is not entitled to the benefit of the ameliorative amendment to Health and Safety Code section 11370.2, subdivision (c).

Defendant's original sentence was imposed in 2016 as a split sentence. The trial court imposed a three-year county jail sentence, followed by three years of mandatory supervision. Penal Code section 1170, subdivision (h)(5)(A) directs that when ordering a split sentence the court is to impose a jail sentence and then suspend execution of some concluding portion of the term for a defined period of mandatory supervision. Defendant never appealed the 2016 sentence.

Senate Bill No. 180 (2017-2018 Reg. Sess.) amended Health and Safety Code section 11370.2 to limit sentence enhancements for prior convictions to only those that involved using a minor to commit drug-related crimes, which defendant's did not. Though penal statutes are presumed to operate prospectively, a defendant whose judgment is not yet final may take advantage of a change in the law that reduces the punishment for a particular offense. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740, 742.) We therefore must determine whether defendant's 2016 judgment was final before Senate Bill No. 180 took effect on January 1, 2018.

The *Grzymski* court analyzed the same issue. Grzymski received split sentences in 2013 and 2015 that both included Health and Safety Code section 11370.2 enhancements; he did not appeal those sentences. (*Grzymski*, *supra*, 28 Cal.App.5th at pp. 803–804, rev. granted.) Mandatory supervision was terminated in those cases in late 2017 as a result of Grzymski committing additional crimes, and he was ordered to serve the remainder of those terms in prison. (*Id.* at p. 804.) On appeal from that order, Grzymski argued the Health and Safety Code section 11370.2 enhancements should be stricken under the *Estrada* rule. The appellate court disagreed, finding that Grzymski's failure to appeal the 2013 and 2015 judgments rendered them final before the amendment took effect. (*Grzymski*, at p. 806.) The court compared the mandatory supervision sentencing scheme to the probation context. The *Estrada* rule will apply when a trial court suspends imposition of sentence and places a defendant on probation, but the *Estrada* rule does not

apply when a trial court imposes sentence and merely suspends its execution for a period of probation. (*Grzymski*, at p. 806; see *People v. Howard* (1997) 16 Cal.4th 1081, 1087.) The *Grzymski* court acknowledged that the analogy is not perfect because a court revoking probation has no discretion to deviate from a previously imposed sentence whose execution has been suspended, whereas a trial court may retain some discretion to terminate the period of mandatory supervision upon its revocation. (*Grzymski*, at pp. 807–808, citing *People v. Camp* (2015) 233 Cal.App.4th 461, 470 [affirming as within the trial court's discretion its decision to terminate mandatory supervision upon discovery that the defendant was ineligible for mandatory supervision by virtue of being subject to an immigration hold that would result in him being deported upon his release from custody].) But the *Grzymski* court found even "assuming that in this sense a split sentence is 'less final' than a probation order suspending execution of the sentence, [it was] unable to conclude that such sentences are not final judgments merely because they are subject to modification." (*Grzymski*, at p. 808.)

Because defendant never appealed the original 2016 judgment imposing the split sentence, that judgment became final well before the amendment to Health and Safety Code section 11370.2 took effect. *Estrada* therefore does not apply and defendant is not entitled to receive the benefit of the Health and Safety Code section 11370.2, subdivision (c) amendment which became effective on January 1, 2018.

III. DISPOSITION

The March 13, 2018 order committing defendant to serve the balance of the split sentence in county jail is modified to dismiss the switchblade and drug paraphernalia misdemeanors (counts 4 and 5, respectively). The superior court is directed to prepare and transmit a new abstract of judgment to remove any sentence associated with those two counts. As so modified, the order is affirmed.

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Grover, J.

WE CONCUR:

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Elia, Acting P. J.

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Mihara, J.